No. 14,590

United States

COURT OF APPEALS

for the Ninth Circuit

MEARL C. TILLMAN and EMILY P. TILLMAN,
Husband and Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

(And Related Cases)

PETITION FOR REHEARING EN BANC

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To the Honorable Circuit Judges, HEALY and CHAMBERS and District Judge, HARRISON:

Now comes the appellants in the above entitled cause and respectfully petition the Court for a rehearing en banc. Sufficient reasons for this petition we believe will be revealed by this statement.

It seems the question here involved is, "Can the Government do wrong?"

We are thoroughly convinced that an opinion favoring the appellee cannot be written with acknowledgement

of the undisputed facts and the all important Oregon statute that can be cited for anything except to answer this question in the negative.

This is the second time in approximately forty-seven years of practice the writer has felt compelled to file a petition for rehearing in any appellate court.

There are fifty-two claimants involved in this proceeding, including Columbia Edgewater Country Club with some 450 or 500 owner members. They have suffered a loss of considerably in excess of one million dollars. These claimants and their families have been brought up as all Americans with the full faith and belief that they will not be deprived of either their life, liberty or property without a fair trial and that the federal courts assure the protection of these rights.

This case involves entirely a question of facts. The issues are whether the claimants had the right to depend upon the Denver Avenue embankment for protection against floods and whether this protection was wrongfully destroyed by the Government's agents, FPHA.

If the issues were considered by the Court in view of the facts as set forth in the pre-trial order and the Court determined that there was no legal liability involved on the part of the Government, then these claimants would be able to understand the reason for their claim being rejected. The issues, however, were entirely evaded and the facts set forth in the pre-trial order which are unquestionable were not only ignored but contradicted, both in the District Court and in this

Court. The express contract giving the landowners the right to use the embankment for which a substantial consideration was paid was emasculated by the District Court and completely ignored by this Court. The all important statute of the State of Oregon imposing a duty on the Government to substitute equal protection when the underpass was constructed was completely ignored by both Courts. These are facts and not law. These claimants can understand these facts as well as anyone else—a legal education is not necessary for that purpose. It is only a matter of common sense on which the legal profession has no monopoly. They know that when the issues are evaded by holding that the breaking of the railway fill on the western side of District No. 1 and a mile or two miles outside of their own district was the sole cause of the flooding, that they have not had a hearing on the issues presented. They know that the breaking of the railway fill was the cause of the flooding of District No. 2 only because the Denver Avenue embankment was destroyed wrongfully by the FPHA with no provision for substitute protection. They also know and are in a much better position to know than the Court that when it is said that they did not depend upon the Denver Avenue embankment for protection that it is not true. How can it be explained to these people that they have had a fair trial and lost their case when they know that the issues are evaded by holding that the breaking of the railway fill was the sole cause of the flooding of their property? How can it be explained to them that they have had a fair trial when they know that the facts found by the

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Court are not true, that they are contradicted by the undisputed evidence contained in the unquestionable pre-trial order?

When this case was tried in the District Court and proposed findings were presented by counsel for appellee, counsel for appellants made strenuous objections thereto, pointing out that there were twenty-nine places in the opinion where the statements of facts made were erroneous and that they contradicted in many places the undisputed evidence contained in the pre-trial order and the balance were unsupported. Thereafter, the District Court requested counsel for the appellants, through the Clerk of the Court, to prepare findings that would support the opinion. Thereupon counsel for appellants prepared findings which were as near as possible a word for word copy of the agreed and material facts in the undisputable pre-trial order. These findings could not possibly support the opinion and of course were not signed.

Later counsel were notified there would be a hearing on the 14th day of September. Counsel for both appellants and appellee were present for that hearing but no hearing was held. Instead the Court requested counsel for both parties to prepare findings which would support the opinion. These facts are not in the printed record but are in the files.

Counsel for appellants could not agree to any finding that contradicted or were unsupported by the pre-trial order and the evidence submitted but were willing to agree to any provision therein to be inserted in the find-

ings. Counsel for appellee thereupon drew the findings and each and all of the factual statements therein contained were taken from the twenty-nine erroneous factual statements in the opinion. None of the material findings were from the pre-trial order or the oral testimony.

The findings finally prepared by counsel for appellee and signed by the District Court were substantially the same findings as those originally prepared with which the appellants have so strenuously objected and which the Court refused to sign over their objections.

In filing this appeal we assigned as error substantially every factual statement made in the opinion as well as in the findings of fact which were signed by the District Court. To our surprise and amazement these assignments of error are disposed of by this Court in the following language:

> "Without setting forth each assignment of error, suffice it to say the findings of the trial court are fully substantiated by the transcript of the record." (Page 4, Opinion)

In the very preceding paragraph in this opinion this Court says:

> "A pre-trial order, prepared with meticulous care, was filed in this case and constituted almost the entire evidence. There was little oral evidence offered and admitted in addition to the pre-trial order, which does not add to or detract from the facts set forth in the pre-trial order."

All of appellants' assignments of error were attacking the facts found by the District Court as being contra-

dictory and not supported by the pre-trial order. Each of these assignments are well founded. This Court says the pre-trial order was meticulously drawn and it of course cannot be disputed. This Court eliminates all of appellants' assignments of error by holding the District Court's findings are fully substantiated. The Court seems to avoid stating the facts as they appear in the meticulous and undisputed pre-trial order. Not one of appellants' assignments of error is considered and no attempt whatever is made to substantiate the Court's finding by the meticulous pre-trial order. The appellants cannot have a hearing by this process of elimination and the ignoring of the Oregon statutes.

FACTS MAKING UP THE ISSUES

Now we ask this Court to consider the issues in this case and to apply the facts as developed from the pre-trial order and the evidence which this Court has already recognized as being meticulously prepared. The undisputable facts developed by the pre-trial order and the evidence are as follows:

1. In 1915 the Peninsula Industrial Company was the owner of the land going to make up Peninsula District No. 1 and Peninsula District No. 2. This was a sizeable piece of ground subject to annual floods.

2. These floods are caused by the melting of snows in the vast area drained by the Columbia River. There are some 259,000 square miles in this area including the area from the summit of the Rocky Mountains to the Pacific

Coast on the West and from far into Canada on the North to Nevada on the South. The height of these floods depends entirely upon the melting of the snows in these areas and when sufficient of the areas are melted for the water to reach Portland at the same time there is a high flood. The 1948 flood was about the second highest flood but there is always every few years a very high flood and always a potential high flood in these mountainous areas.

3. In 1915 Peninsula Industrial Company conveyed two strips of land to the County of Multnomah eighty feet in width and together approximately three miles in length (Deed R. 455-465). Parcel A in the deed is Union Avenue and Parcel B is Denver Avenue. The county was given the right to slough over fills on to the private grounds for the sole and only purpose of maintaining a highway over the top. The fills were sloughed over until it took a width of 317.6 feet for Denver Avenue (R. 23) and approximately 125 feet on Union Avenue (R. 55) (Appendix A App. Br.).

4. The sole consideration for this deed was that the county agreed to construct and maintain an enbankment over Parcel B (Denver Avenue) equal to the bridge approach (R. 23).

5. The deed provided for mutual easements. The Peninsula Industrial Company and its successors in title were entitled to make use of the bank and hook on to it (R. 24). The County had the right to maintain a highway over the top of the embankment placed upon the private grounds and had no other rights. This arrange-

ment also provided mutual protection against high floods that were always anticipated. If the landowners built dikes around the perimeter these dikes would give added protection for the highway. If such dikes were not built on one side or the dikes broke on one side this highway embankment would protect the other.

6. The appellants in this case are all owners of parcels of land within District No. 2 and have the rights provided by that deed as successors of the Peninsula Industrial Company.

7. In 1917 Peninsula District No. 2 was organized (R. 17) in which they adopted the Denver Avenue embankment as its western border and the Court found that it was protected on various sides and places by embankments already in place which would include the Denver Avenue embankment (R. 332-333). From this time on every landowner in District No. 2 was endowed with the right to have all dikes maintained, including Denver Avenue embankment.

8. This Denver Avenue embankment was the only protection that Peninsula District No. 2 had from flood waters from the west. This embankment was built ultimately to a height of 37.6 feet and it was more than three times the width and strength of the strongest portion of the strongest dike on its perimeter and it was built in the identical manner. (See Comparison of Dikes, Appellants' Brief, Item 4, pages 56-62).

9. Peninsula District No. 1 was organized also in 1917 and adopted Denver Avenue embankment as its

eastern protection (R. 17). The rights of the two districts in this Denver Avenue embankment were identical. They were derived from the same instrument.

10. The statutes of the State of Oregon provide that where the owner of a parcel of land in a diking district over which any dike of the district exists, has the right to change the dike and prescribes the manner in which it can be done (ORS 551.140, OCLA 123-216).

11. This statute provides that in order to destroy a dike at any point the owner of the property desiring it to be done must apply to the County Court, (or the Circuit Court in Multnomah County) for permission to do so and must get the permission of the Court.

12. The same statute also provides that if such is done by any owner of any parcel, then it owes the duty to substitute for the dike to be removed another dike of equal protection and to give unto the district the same rights as it had over the original.

13. Peninsula District No. 1 had no protection on the west except for railway fills which were of questionable value and over which they had no authority whatsoever (R. 30). They had no right to connect to this railway fill nor to depend upon it.

14. Peninsula District No. 1 with no protection except the railway fills remained a swampland until FPHA acquired the title to approximately eighty per cent thereof to build a temporary housing project. Since the washing out of Vanport by the 1948 flood it has again reverted to swampland.

15. Peninsula District No. 2 on the other hand, with the protection on the west of Denver Avenue embankment three and one-half times the size and strength and built in the identical manner as the outside dikes, was completely developed (Completion Report by Government Engineer Dibblee, R. 450). Many homes and industries were built therein and a grade school was built behind this Denver Avenue embankment for the schooling of the many children of the many families living therein.

16. In 1942 Kaiser Company, contractor for the Government, constructed a housing project in District No. 1 for temporary war purposes.

17. Someone seemed to have thought that they needed an underpass through Denver Avenue embankment so as to enable residents of Vanport coming from the Portland side to enter into the Vanport area without crossing traffic. Such an underpass could have been provided for entrance to the Vanport area at the south side of District No. 2 where an underpass was constructed by the Highway Commission with full protection to District No. 2 (R. 29). Entrance could also have been made to the Vanport area at the north end near the bridge through the underpass constructed by the Highway Commission which was also protected by the high ground and fills (R. 28). It could also have been protected by a very minor provision for stop lights at the point. Vanport had other modes of entry and exit so this underpass was not necessary but only desired by FPHA.

18. This underpass was constructed without any authority whatsoever except a permit from the Highway Commission which had no authority over the ground except to maintain a highway over the top (R. 293). It was constructed three-fourths on private property (the embankment) with no consent whatever from the land-owners.

19. In constructing this underpass they made no attempt whatsoever to procure the consent of the Circuit Court as required by the statutes of the State of Oregon (R. 48).

20. They made no attempt whatsoever to provide a substitute dike of equal protection as required by the same statute (R. 53).

21. A ring dike around this underpass was constructed by FPHA, an agent of the Government, for the sole purpose of protecting its own dollar investment in Peninsula District No. 1 (R. 97, Cont. No. 23).

22. This ring dike gave no protection whatsoever to District No. 2 for the reason that it had a hidden culvert under it which permitted the flow freely of water from west to east but had a flood gate preventing the flow of water from east to west (R. 53). Also it had a clay blanket on the east to protect from water on the east but no similar protection on the west (R. 52). It was not even contended by the appellee that this ring dike gave any protection whatsoever to District No. 2. In fact, it was one of their express contentions that it was not so intended and no one was ever authorized to do anything for the protection of District No. 2 (R. 97).

23. The rights of Peninsula Dictrict No. 1 and Peninsula District No. 2 were identical. These rights stem from the original deed from the Peninsula Industrial Company to Multnomah County giving the same rights to the landowners on either side of the Denver Avenue embankment.

24. By this act the appellee, through its agent FPHA, stole the protection that Denver Avenue embankment afforded from District No. 2 completely and adopted it for its own protection in Peninsula District No. 1. They had to consider that the Denver Avenue embankment was sufficient to withstand any flood waters from either side in the event of a break of any of the dikes. In fact, it was sufficient and did withstand the flood of 1948. The flood waters completely flooding Peninsula District No. 2 came through the underpass and they got no flood waters from any other source (R. 82).

25. In constructing this underpass the appellee, through its agent completely destroyed the easement which District No. 2 had upon the Denver Avenue embankment making it worthless and useless. Also the Government in taking the land, upon which this ring dike was built on the east side of Denver Avenue embankment, took it subject to the easement which Peninsula District No. 2 had to make use of this embankment for its protection (R. 471-472).

26. From the time of the organization of Peninsula District No. 2 in 1917 Denver Avenue embankment was always recognized as the primary and only dike protecting Peninsula District No. 2 on the west. The High-

way Commission had built two other underpasses, one on the south and one on the north of the district, both of which the Highway Commission protected against floods (R. 28-29).

27. The Denver Avenue embankment might be considered as a secondary dike for protection from floods coming from the west as to that portion of it lying between the north and south dikes of District No. 1 because until the railway fill or dikes in District No. 1 broke there would be no water against this dike. However, Mr. Turnbull, one of the expert witnesses for the appellee testified that it would be wrongful to cut a secondary dike (R. 244). However that may be, Denver Avenue embankment was the only and therefore the primary dike of District No. 2 protecting it on the west.

28. The "meticulous" pre-trial order provides that the dikes and railway fills around District No. 1 were protection to District No. 2 only in the sense that in the absence of a failure of those dikes or fills flood waters could not approach Denver Avenue (R. 29-30, Sub. 8). No contention is made by the appellee that District No. 2 depended on District No. 1's outside dikes or railway fills.

29. Floods in the Columbia River are as certain as the arrival of the time in Spring when the snows of the vast mountainous areas begin to melt. There is always a fight to protect all dikes, primary or secondary, during these flood periods and it is extremely wrongful and negligent to destroy any of these protections whether they be primary or secondary. Government engineer

Dibblee in his flood report recommends the elimination of this underpass (R. 459).

30. After the cutting of this underpass, there was no way whatsoever that Peninsula District No. 2 could protect itself against floods from the west. Denver Avenue embankment was its western boundary. The Government condemned the land bordering on the underpass to build a dike for its own protection only. The railway fill was in the hands of the railway company and located some mile or two outside of the district. Even if it had been within the bounds of reason and possibilities for Peninsula District No. 2 to finance a new dike, there would be no way of it condemning the railway fill or the highway, or the ring dike built on Government property. There was no other place where a dike could be built except by cutting its district in two and going to the enormous expense of duplicating the Denver Avenue embankment with a portion of its district eliminated from participation therein. And then, if this case is any authority, there would be no protection against the Government, or one of its agents or anyone else, deciding they wanted another underpass through such new dike or for that matter through any of its dikes. The Highway Commission maintains a highway over its dike along the Columbia River with the same rights it had over Denver Avenue. What is to stop the Highway Commission from cutting an underpass through it or granting a permit therefor?

These are the facts which are set forth in the "meticulous" pre-trial order and in the evidence. They are un-

disputed as has already been said by this Court. These are the facts upon which the plaintiffs rely. These are the facts upon which the issues are formed and there is nothing in the pleadings, either the complaint or the answer, nor in the contentions of either party that deny these issues or justifies the Court in evading them. The appellee was represented by highly competent counsel. If there had been any grounds to base a contention that the breaking of the railway fill was the sole cause of the flooding of District No. 2 or that District No. 2 depended on the fills and not Denver Avenue, they would have made that contention. It would not have been necessary for this Court or the District Court to create that as an issue.

We believe it would be helpful to the Court considering this case if the Court will refer to the composite map of Peninsula Districts No. 1 and 2, Appendix A of appellants' brief.

CONFUSION AS TO EVIDENCE

Counsel for appellee, during the course of the trial, became confused and represented to the Court that when Peninsula District No. 2 was reorganized in 1928 that in their application for the reorganization they referred to the dikes surrounding Peninsula District No. 1 on the west and the language of that instrument considered Peninsula District No. 1 and No. 2 as the same thing, each protecting the other. We are satisfied that the District Court became confused by these representations. These representations were due entirely to the confu-

sion of counsel for appellee with no intention whatsoever of misleading the Court or misrepresenting it. However, the results seem to have been the same as the District Court in its opinion seemed to indicate that it believed that the two districts were the same and depended upon each other, and this Court has adopted the same theory.

Mr. Lowry, counsel for appellee, prepared appellee's brief in this Court. He referred throughout his brief and quoted several times this reorganization proceeding quoting it as referring to Peninsula District No. 1's dikes as protecting District No. 2 on the west. No such language appears in this reorganization proceeding. The reference was to Multnomah District No. 1 lying to the east, not to Peninsula District No. 1 lying to the west. The confusion came about from all parties referring to these two diking districts as District No. 1 and District No. 2. Mr. Lowry freely admits his error although since he has filed no additional brief it does not appear in the record.

In order to surely disabuse this Court's mind of this confusion the appellants used the first five and one-half pages of their reply brief to call attention to this error and referred to the error continuously through that reply brief. Apparently we were still not successful in disabusing the Court's mind of this confusion.

There were other reasons which might have caused some confusion. The pre-trial order was made up very largely of facts which had nothing whatsoever to do with the issues: reference to the railway fills, the dikes

surrounding District No. 1, the organization of FPHA and HAP and the vast amount of material which had something to do with the Vanport cases and nothing whatsoever to do with this case was immaterial. Once unofficially the appellants objected to the appellee placing this material in the pre-trail order as well as the mass of exhibits which had no bearing on the case. But they were advised by the Court that it would permit the Government to place these facts in the pre-trial order. After that no objections were made and this accounts for the vast amount of material in the pre-trial order and the mass of exhibits which had no bearing on the case being in the record. As a matter of fact, the material matter in the pre-trial order takes only a few pages. This necessarily made the record so large that it was perhaps discouraging to the Court to pick out the material things and therefore somewhat confusing.

FACTS FOUND BY THIS COURT

Now let us consider the factual findings that were made by this Court in its opinion, taking the statements in the order in which they appear:

1. In the third paragraph on page 2 of the opinion this Court finds that the underpass was constructed for the convenience of those living in Drainage District No. 2.

This statement is simply not true. There is nothing in the "meticulous" pre-trial order or in the evidence that would justify any such conclusion. The physical

conditions in the area absolutely controverts this statement. The underpass was blocked on the east by the ring dike constructed by the Government so there was no entrance through this underpass from one district to the other and could not be. Those living in District No. 2 would have no more use for the underpass than any ordinary member of the public and they would have to go a roundabout way to get to it. There is no showing that any district official or any person living therein had any purpose to use this underpass, and it is doubtful if any of them ever passed through it. This statement was taken by this Court not from the "meticulous" pre-trial order but from the opinion of the District Court on page 129 of the Record. There was no justification whatsoever for such a finding by the District Court and no justification for this Court making the same finding except this erroneous statement by the District Court.

2. In the very next paragraph appearing on page 2 of this opinion, the Court finds that the State Highway Commission constructed this underpass. There is likewise no justification for this statement. The Government's agents requested the State Highway Commission for permission to construct an underpass, which they had no right to grant. There is no justification for this statement that it was constructed by the Commission. The permit on page 293 of the Record shows only that condition that the Highway Commission would look to its upkeep only during the period of the war at the expense of FPHA. The Commission had nothing to do

FPHA was permitted to construct an underpass on the whatsoever with the construction of the underpass except that it did prepare plans, at the request of FPHA, and did loan to FPHA an engineer to supervise the construction as an employee of FPHA.

3. This court in its opinion on page 2 at the bottom paragraph referring to the dikes surrounding District No. 1 makes this statement:

> "The same works protected District No. 2 on its western side. District No. 2 between 1917 and 1921 built dikes on its north, south and east sides which connected with the works of District No. 1, thus completely surrounding both districts. Neither district spent time nor money in attempting to strengthen the mound-fill upon which Denver Avenue is located. At no time was any request made of any one that the Denver Avenue fill be strengthened as a part of the protection to be afforded said Drainage District No. 2."

Here again there is no jusification whatsoever that can be found in the "meticulous" pre-trial order which jutifies the statement. It was true that so long as there was no break in the dikes or railway fills surrounding District No. 1 there would be no flood waters against that portion of this embankment which lies between the north and south dike of District No. 1. However, the dikes of District No. 1 did not joint with District No. 2. The maps and records show that the south dike of District No. 1 was some 400 feet or so north of the south dike of District No. 2 so that even considering that the dikes around Peninsula District No. 1 were some protection to District No. 2, it would still be only a partial

protection. Also there is no evidence whatsoever that District No. 2 placed any reliance on the dikes of District No. 1.

Now as to the statement that no request was made of anyone to strengthen the Denver Avenue embankment and no money was paid by either district in attempting to strengthen it; the Court should remember that the "meticulous" pre-trial order sets forth in specific terms an agreement on the part of the county to maintain this embankment equal to the bridge approach and it was maintained to a height of 37½ feet and to a width of over three times the strongest portion of the strongest dike on the outside of the district and it was built in the identical manner (See Comparison of Dikes, App. Brief 56-62). The only time a request was made to the Government engineers to assist the district in improving its outside dikes springs from the reorganization of District No. 2 in 1928. That petition was filed in the Circuit Court of Multnomah County requesting permission for the district to increase its outside dikes to the equivalent of the Denver Avenue embankment (R. 25-27). They were given this permission together with permission to assess themselves $25.00 per acre for that purpose. This was apparently not sufficient and the aid of the Government was granted. Thereafter they did improve the outside dikes to the equivalent of Denver Avenue embankment (R. 19-21).

Now when it is considered that the request was only to bring up the outside dikes to the equivalent of Denver Avenue embankment it appears obvious that the Gov-

ernment engineers would have taken a dim view of spending money to improve the Denver Avenue embankment when they were only bringing the outside dikes to the equivalent of Denver Avenue embankment. It would have been an absurdity for the District to have spent time or money improving Denver Avenue embankment or to request the Government to do so. This becomes more absurd when it is recognized that the State Highway Commission during the same period did actually increase the size and strength of Denver Avenue embankment by building it up from 33 feet at that time to 37.6 feet (R. 22). This is all set out in the "meticulous" pre-trial order. There is no source for this finding by this Court to have been taken except from the District Court's opinion appearing on page 128 of the Record. This is one of the twenty-nine unsupported findings of the District Court to which reference has already been made.

4. In the next paragraph at the top of page 3 of the opinion this Court does recognize that the ring dike was built only to afford protection to District No. 1 and possible overflow of waters from the east in the event of failure of the dikes in District No. 2. Then the Court makes this statement:

> "Subsequent events disclosed it did afford some protection to the properties located in District No. 2."

This statement is also taken from the District Court's opinion on page 130 of the Record where the District Court said that this ring dike did in fact afford some pro-

tection since it delayed the waters for thirty hours so that District No. 2 was not flooded for thirty hours after District No. 1. It should be remembered that the residents of District No. 2 had spent millions of dollars in improvements to their property; that there were so many residents that they built a grade school for the schooling of their children. This flood happened on a holiday so that the children were not in school. It can be imagined what a tragedy this might have been had this dike broken on some other day than a holiday and what a future tragedy there can be. It was only contended as we understand it by the appellee and by the District Court and now by this Court that this thirty hours gave the residents an opportunity to save their lives and perhaps to salvage some of their personal property. No damage is being claimed for the lives that were saved or the personal property that was salvaged. Damage is being claimed for the destruction of the millions of dollars of personal and real property which was flooded and the destruction of their homes. It appears only accidental that this embankment delayed the water even for thiry hours as this ring dike was constructed only for the purpose of delaying waters coming from the east. In fact, no engineer, no witness, makes any claim for it that it was of any service against waters coming from the west. How can some 500 people be appeased after the destruction of their property by the removal of the strongest dike they had by telling them they should be happy because of the accidental delaying of the flood by this "one way dike," thus enabling them to save their lives and salvage some of their

movable personal property. What possible legal defense can be claimed for this accidental delay? These people all know that they had a dike in Denver Avenue embankment which they had depended upon since the organization of the district in 1917. They all know that it was strong enough to withstand this flood and that that was proven by the fact that the embankment did stand up and no water flooded onto District No. 2 except through the underpass. They all know that this embankment was over three times the size and strength of any in the district, all of which held. Is it possible for this Court or any court to hold that anyone can remove a dike which has been provided by a drainage district if they delay the waters for a few hours so that the residents may save their lives?

5. In the next paragraph on page 3 of the opinion the Court says that on May 30, 1948 an unprecedented flood on the river occurred. This is not true. The "meticulous" pre-trial order shows that a flood occurs in the Columbia every year as certain as the year rolls around. Its height is never predictable because it is caused from the melting of the snows from 259,000 square miles of area, mostly mountainous, and the height of the flood depends upon the weather conditions that may cause the snow in a great portion of this area to melt at about the same time so that the water therefrom reaches Portland at the same time. It is true that this was one of the largest floods but a high flood, it is shown by the record, occurs quite frequently and there is always a potential high flood in this mountainous area.

At this point we would like to call the Court's attention to what the Honorable Judge James Alger Fee said in the case of Clark v. United States, 109 Fed. Supp. 227, which were the Vanport cases.

> "Each of plaintiffs could have found as easily as other persons in the area that the Columbia has from time to time been subject to tremendously high water. * * * This fact has been of national importance. The Court would take judicial notice of this fact as well as of the floods in the Mississippi. It could have been ascertained by any plaintiff as a matter of general knowledge that such floods do overtop and break down protective works and dikes. * * *"

6. In this same paragraph above quoted from, the second paragraph on page 3 of the opinion, this Court says:

> "District No. 2 was protected by the Denver Avenue fill until the next day, May 31st, when the ring levee constructed at the east of the underpass gave way, and as a result District No. 2 was also flooded."

Thus it appears that this Court recognizes that the flooding of District No. 2 was due to the underpass and to the inadequate protection given by the ring dike and it would seem to be entirely contradictory to the statement made in the fifth paragraph falling on page 3 of the opinion as follows:

> "The breaking of the railroad embankment was the sole cause of the flooding of District No. 2."

7. In the fourth paragraph of the opinion this Court says:

> "* * * these landowners or their predecessors were endowed with certain powers and charged with the

> responsibility of taking the necessary action to protect lands within their respective districts and had the authority to levy assessments to do so."

It is true that they do have such authority but why does the Court ignore the fact that they did protect District No. 2 with an embankment on the west known as Denver Avenue embankment when they made an agreement with the county to construct and maintain this embankment giving them the privilege to use it, paying a valuable consideration for it. Thus they had provided protection but why does the Court completely ignore this all important written agreement? What difference could it have possibly made had the district constructed this same embankment with no highways running over in and at their own expense? There was a situation here where the county and the Highway Commission had to build an embankment for the interstate bridge approach. It is running over ground that was necessarily overflowed every year and had to be water proof. Under the situation where this embankment could act both as a highway and as a dike, both parties concerned, the county and the district, were willing for it to perform such a dual purpose and expressly agreed to it. It would have been ridiculous for District No. 2 to have duplicated this embankment even though they might have been able to accept the impossible and raise the enormous funds necessary therefor. What right could any third party gain to destroy this embankment at the expense of District No. 2 and what possible facts can be developed therefrom that would justify a Court in holding that it could be cut by anyone without authority and

with immunity? What possible reasons can the Court find for ignoring such an express and all important agreement and the rights therein granted?

8. In the next paragraph in this opinion on page 3 this Court says:

> "District No. 2 depended on the western embankment of District No. 1 to protect it from overflow from the west. The breaking of the railroad embankment was the sole cause of the flooding of District No. 2 * * *"

There is no authority whatsoever in the "meticulous" pre-trial order to justify any such conclusion and had there been the very competent counsel for the appellee would have raised the point. The Court has taken this statement from the opinion of the District Court (Page 133 of the Record). The Honorable James Alger Fee wrote the opinion in Clark v. United States, 109 Fed. Supp. 213. This opinion shows an exhaustive study of the facts involving the Vanport cases and involving this same flood. If the same exhaustive study had been made of the issues and the facts in this case we feel certain that the ruling would have been different. We call the Court's attention to what was said in that case, page 220, and we quote:

> "The ground should be cleared first. Denver Avenue fill broke after Vanport was flooded, so no causal connection between that incident and any property damage here complained of can be established."

Thus it seems that both the District Court and this Court recognize that there was no connection between the breaking of the railway fill and the breaking of

Denver Avenue embankment but at the same time it is held in both courts that the breaking of the railway fill was the sole cause of the damage to the property lying east of Denver Avenue embankment. Thus it would seem that the Court contradicts itself. The breaking of the railway fill, of course, was not the cause of the flooding of District No. 2 except for the fact that the protection of Denver Avenue embankment had been destroyed and the flood rushed freely through this underpass. There was no contention by the Government or by anyone else and no evidence produced in this case whatsoever and nothing is to be found in the "meticulous" pre-trial order that raises any issue whatsoever as to the breaking of the railway fill nor that that was the cause of the flooding of District No. 2.

Can these 500 people be satisfied by telling them that the sole cause of the destruction of their homes was the breaking of the railway fill? The Court could just as well say that the sole cause of the flooding was the accumulation of the winter snows over this vast mountainous area. Can these people be satisfied that they have had a trial of their cause when they know these statements are not a fact? When they know that they had ample protection, for which a valuable consideration had been paid, and that it was destroyed without authority and in violation of the statutes of the State of Oregon?

9. In the next paragraph on page 3 the Court says that the Federal Government did not construct or have any control over Denver Avenue or the underpass. This

is true as to Denver Avenue but it is not true as to the underpass. The underpass was on ground belonging to the Government and was constructed by the Government and was cared for at its own expense. It was nothing but a private right of way to the housing project.

10. In the same paragraph this Court says:

> "While the federal government paid for the construction of the ring levee and it stood upon government owned land, it was never relied upon by District No. 2 for protection. If any reliance was placed thereon, it was by District No. 1."

The "meticulous" pre-trial order shows that District No. 2 relied upon Denver Avenue embankment from the time of its organization in 1917. It shows that when the ring levee was constructed that from its size it would appear to a layman that it was sufficient to protect against this underpass. It shows there were concealed defects in it which made it useful only to protect water from the east, not from the west. It shows that people in District No. 2 continued to live behind this ring dike, and continued to send their children to the grade school which had no adequate protection from the west except this embankment. It shows they continued to improve their property which was never done by anyone living behind the railway fills with it as their only protection from floods from the west. Thus, it is not possible for this Court to say from any of the evidence that no reliance was placed in this fill by anyone in District No. 2. This is particularly true when these residents knew that no one could remove or destroy a dike under the statutes of the State of Oregon without assuming a duty to substitute equal protection therefor.

In this same paragraph on the top of page 4 this Court says:

> "No one contemplated any danger of overflow from the west * * *"

We call the Court's attention to the opinion of Honorable James Alger Fee in the case of Clark v. United States above quoted where he says that the Columbia River is from time to time subject to tremendously high floods, and it was a matter of general knowledge that such floods do overtop and break down protective works and dikes. There is no evidence whatsoever in the pretrial order or the evidence that would justify such a statement. This statement is taken entirely from the opinion in the District Court which was contradicted by the same court in the Clark case. One or two witnesses testified that they had no reason to anticipate a break of the railway fills. It could well be true that those individuals had no reason to contemplate such a disaster but there is no showing that they had any knowledge upon which to base such statements. In any event, the people in District No. 2 foresaw the possibility when they made their contract with the county to maintain this embankment. It is also shown that other people contemplated it for the reason that no one except the Government building its housing project had been willing to spend money in the development of Peninsula District No. 1, which had no other protection on the west except the railway fills.

The Court in this same paragraph then goes on to say:

> "* * * for six years after the underpass was cut and the ring levee constructed, Drainage District No. 2 did nothing to protect itself, notwithstanding it had the continuous duty of maintenance, strengthening and repair of either Denver Avenue or the western embankment. All of this time the district had sovereign power of eminent domain and assessment for such purposes."

This statement was also taken from the District Court opinion, not from the pre-trial order. We have already pointed out that there was no possible way that District No. 2 could have protected itself. The only way suggested in either Court was to strengthen the railway fills two miles or so to the west or to strengthen Denver Avenue embankment. We don't believe this would be authority for a drainage district to condemn either a railway fill or a public highway nor for the condemnation of the ring dike which had been constructed and was owned by the United States. The physical situation shows that there was no other way of protecting themselves against this underpass. In addition to that, these people in District No. 2 were undoubtedly relying on the protection that the ring dike would give them and were justified in such reliance. As already pointed out the physical appearance of this ring dike was sufficient to convince any layman that it was sufficient. This is particularly true in view of the fact that the statutes of the State of Oregon made it a duty for the Government to afford equal protection when this embankment was destroyed. This all important statute we wish to point out has been completely ignored by the District Court and by this Court. We have pointed it out and quoted

it time after time but so far have not been able to get either the District Court or this Court to acknowledge it. Would this opinion be authority for the proposition that one wrongfully destroying a dike is relieved of obligation if those who were damaged do not protect themselves?

In the third paragraph on page 4 this Court says:

> "Without setting forth each assignment of error, suffice it to say the findings of the trial court are fully substantiated by the transcript of the record."

This it seems to us is merely a summary dismissal of our appeal with an evasion and refusal to recognize the issues and the facts involved and is based upon factual statements which are contradictious, unsupported and a distortion of the "meticulous" statements of facts in the pre-trial order. We respectfully do not believe that any evidence can be found to support any of these findings to which we have objected. They can only be supported by brushing aside the objections without considering them. We have the greatest faith in the Federal Courts and in the integrity of every member of the bench. We have had and still have a very high regard for the Honorable James Alger Fee and appreciate and admire the many exhaustive and instructive decisions that he has made. But in this case which involves practically nothing but facts which the layman can well understand, we can find no way of explaining to them that they have had a fair trial upon the issues presented by them and the facts that were developed in the pre-trial order. We are therefore asking this Court for a rehearing en banc.

11. This Court in the next paragraph of its opinion on page 4 makes this statement:

> "An identical factual situation was presented to this court by the inhabitants of Vanport wherein this Court in Clark v. U. S. 218 F. 2nd 446 at page 451, said * * *"

This statement is not understandable. In the first place these fifty-two cases were segregated from the Vanport cases and tried separately for the very reason that there was no similarity whatsoever in the issues presented. Again we wish to call the Court's attention to the statement made by the Honorable James Alger Fee in that case on page 220 as follows:

> "The ground should be cleared first. Denver Avenue fill broke after Vanport was flooded, so no causal connection between that incident and any property damage here complained of can be established."

Also the statement in the opinion of this Court, page 3:

> "District No. 2 was protected by the Denver Avenue fill until the next day, May 31st, when the ring levee constructed at the east of the underpass gave way, and as a result District No. 2 was also flooded."

The Court then goes on to quote these Vanport cases as holding that the Government had no responsibility over the railway fills and no liability could attach to or rest upon the United States for any damage by flood or flood waters at any place. Perhaps the Court meant by this that since it had already decided that the breaking of the railway fills was the sole cause of the damage in District No. 2 then it became a question of whether the United States Government was liable for the breaking

of those fills. If that question was involved here we could have no fault to find with this ruling. However, we must insist that the railway fills are not involved in this proceeding. We must insist that we are intitled to a hearing on the issues presented which are that District No. 2 had as its western protection the Denver Avenue embankment which was wrongfully destroyed without providing equal or adequate protection. We must insist that Section 702 (c) 33 USCA cannot apply to the destruction of Denver Avenue embankment and the failure of the Government to provide adequate protection. According to the evidence of Mr. Schanck it would not have taken a flood to have broken through the ring levee that was provided by the Government to protect this underpass (R. 167). And since this ring dike was not built by the Government in aid of the diking district and the destruction of Denver Avenue embankment was wrongful and a duty was imposed upon the Government to substitute equal protection therefor, this Section 702(c) cannot apply.

12. In the first full paragraph on page 5 of the opinion this Court quotes from the Honorable James Alger Fee's opinion in the District Court as follows:

> "The sole cause of damage to plaintiffs was the failure of the western embankment at District No. 1 * * *"

This we have already pointed out is not supported by the "meticulous" pre-trial order or by any evidence or any pleading or any contention. The only place it could be taken from was the opinion of the Honorable James Alger Fee and it was not supported in any manner. It

was one of the twenty-nine errors in the factual statements of the opinion which have already heretofore been mentioned and it was contradicted by this same Court in the Clark case as above pointed out.

The 500 people involved, we repeat again, cannot understand why they are unable to get a hearing on the issues presented to the Court and why the actual facts are not considered. They can never be appeased by telling them they relied upon the railway fills two miles outside of their district and not within their control, and did not rely on Denver Avenue embankment on which they had a specific contract, when they know it was not the fact. Or can they be appeased by holding that the sole cause of damage was the breaking of the railway fills when they know that is not the fact.

13. In the next paragraph of the opinion of this Court on page 5 this Court says that:

> "The evidence unmistakably discloses that the failure of the railroad embankment in District No. 1 was the sole and proximate cause of the flooding of District No. 2, an embankment over which the Government at no time had any control. This eliminates any consideration as to the ring embankment."

Just how this Court can arrive at such a conclusion is not understandable. There is no evidence whatsoever in the "meticulous" pre-trial order that would justify such a conclusion. The duty imposed upon the Government or anyone else destroying a dike in this manner by the statutes of the State of Oregon to provide substitute and equal protection is completely ignored and is

not mentioned in this opinion at all. Why was this all important statute ignored? How is it possible for this Court to say that because the breaking of this railway fill was the sole cause it eliminates any consideration of the ring embankment when that underpass and ring dike are the only issues in the case?

14. In the last paragraph on page 5 the Court says that it is difficult to rationalize the case of Indian Towing Co. v. U. S., 350 U.S. 61, which was decided after this case was submitted and the citation was presented by counsel for appellants. That case held that where the Government undertakes to maintain lights for the guidance of shipping it owes a duty to maintain such lights and is responsible for damages if it fails to do so. The opinion goes on to say that the ring dike in this case was built for the protection of District No. 1 in the event the levees in District No. 2 should fail. The protection of Drainage District No. 2 was solely the responsibility of said district. The opinion still goes on to say that the inhabitants of District No. 2 had the power and duty to protect themselves and that they cannot now as an afterthought charge the Government. This reference to "afterthought" is also taken from the opinion of the District Court and not from the "meticulous" pre-trial order which showed that this dictrict had provided for and relied upon the Denver Avenue embankment at all times since 1917. The Court also ignores the fact that the rights of District No. 1 and District No. 2 were identical. There was no more reason for protecting District No. 1 than for protecting District No. 2. In fact, not as much. This Court in making this statement

ignores the statutes of the State of Oregon which very definitely imposes the duty of one removing a dike or a portion thereof to substitute equal protection. It is a duty, in the opinion of counsel for appellants, that would be imposed on anyone for removing a dike even without this statute. But with the statute expressly imposing that duty, we cannot understand the Court's ignoring it.

This statute provides as repeated many times, that when an owner of a parcel of property in a district over whose lands a dike has been built, desires to move the location of that dike and destroy it, then he can do so by filing a petition with the Court and getting approval of the Court but is duty bound to substitute another dike of equal protection to the satisfaction of the engineer for the district. In this case the Government took no such action. It simply destroyed the dike by cutting this underpass with no authority from anyone having the right to grant it. Can it be possible that this Court is holding that if one filed such a petition and followed the statute he would have the duty imposed upon him to substitute equal protection, but if he does the act wrongfully without any authority from any source, then there is no such duty imposed? Can it be possible that this opinion can be cited as authority to this effect?

The opinion in the same paragraph then goes on to say:

> "Apparently appellants feel the government owed a duty to maintain the ring embankment for the protection of the inhabitants of District No. 2."

Most certainly we so feel. Could such a duty be imposed upon the Government any more clearly and certainly

than by the statute already referred to but which this Court has ignored?

At this point we wish to refer to the case of United States vs. Ure, reported in Federal Reporter, 2nd Series, Vol. 225, page 709. This is an opinion reversing the District Court. At the argument in this case when this was called to the writer's attention, he was very much embarassed by not having caught it although it was reported in the last advance sheets prior to the argument. We find this opinion is helpful and not harmful to our cause. This opinion holds that the tort claims act may be invoked on a negligent or wrongful act or omission. Then the Court recites that this irrigation ditch was inspected twice daily by the government employees and there was no evidence of negligence. The damage resulted in failure in the first instance to line the ditch with concrete in one certain spot. The Court holds as we understand it, that full consideration had been given to this in the first instance together with consideration of the money available for the purpose and it was determined that it was unnecessary to line the ditch with concrete at that particular place. The Court recites that it had held up for 11 years and considers that the failure to line this ditch with concrete was a matter of discretion and not wrongful for which the government was not responsible.

We are fully in accord with this decision. It is obvious, as the Court said in its opinion, that the Court looked to the record and not to the opinion or findings of the District Court in making this decision. Now if we can induce the Court to look to the record in this case, which consists of a meticulously drawn pre-trial

order to which there can be no dispute and a very small amount of oral testimony in which there was little or no dispute, then it will feel that the actions of the government's agents in this case were both wrongful and negligent. If the Court will review this record, it will find that District No. 2 relied upon this Denver Avenue embankment as its western protection at all times since 1917 (R. 22, 26, 446, 251, 344, 347); it will find the District had an express agreement for the mutual protection and benefit of the County, the Highway Commission and the two Districts under which this embankment was looked upon and used as a dike (R. 28); it will find that the Government agents had notice of this express agreement and that it took its land expressly subjected to this easement (R. 472); it will find that the dike was destroyed by the construction of the underpass and that the easement for District No. 2 was likewise destroyed with no authority whatsoever (R. 48); it will find that this underpass was desired for convenience only and that it was not necessary (R. 48); it will find that the government's agents were willing to destroy the protection to District No. 2 for their own personal convenience and to subject the lives and property of the residents, their families, their children congregated in the grade school and all of their investments to the great hazard which was followed by the great tragedy of 1948 and the complete flooding and terrific destruction of the appellants' property (R. 53); it will find that the government's agents appropriated this same embankment for the protection of its own dollar investment in District No. 1 with no consideration whatsoever for the

protection of District No. 2 (R. 53); it will find that the government's own witness, Mr. Turnbull, testified that the destruction of this dike was unsound whether it be considered as a primary or a secondary protection (R. 244); it will find that the government's own engineer, Mr. Dibblee, in filing his flood and completion report, stated that Denver Avenue embankment was a dividing levee (R. 446) and recommended that this underpass be eliminated (R. 454).

As we see it, under these circumstances, no Court could find that this was the exercise of proper discretionary power or could find that it was anything but a wrongful act.

Now as we go further and can induce this Court to recognize the so far ignored statutes of the State of Oregon, it will find that when this dike was so destroyed by the underpass, the government was expressly subjected to the duty of providing equal protection for the residents of District No. 2, (ORS 551.140 - OCLA 123-126). In the case of Indian Towing Co. vs. United States, 350 U.S. 61, the U. S. Supreme Court held that when the government is subjected to a duty, it is negligent in not fulfilling that duty and becomes liable under the tort claims act. Going further, the Court will find that when the government took the property on the east side of Denver Avenue for the purpose of building its ring dike, the property was subjected to the easement of District No. 2 for the use of this embankment (R. 471-472). It follows that when the government took this property, it became bound with the duty to respect and recognize that easement and not to destroy it. So that

under the Indian Towing Co. case above quoted, it would be negligence on the part of the government to destroy this easement; of course it would also be wrongful; the Court will also find that two of the government's agents, employees of PHA, secured the assistance of a government engineer and recommended that the ring dike be built up to standard so that it would give protection to both Districts but they were only scolded for their interference by FPHA (R. 349-363 and R. 191-194). Under all of these circumstances, there can be no question but that the government was guilty of a wrongful act in destroying the embankment and destroying the easement and that it was guilty of negligence in not fulfilling its duty in providing equal protection for both districts and in its failure to recognize and protect the easement to which its land had been expressly subjected.

Now we ask the Court in all humility, in view of the fact that all of the legal principles involved in this proceeding are favorable to the appellants and in view of the fact that all their assignments of error were directed to the 29 contradictory, unsupported and erroneous findings of the District Court; can these appellants possibly have a fair hearing by the process of eliminating all of these assignments of error by the adoption of the 29 contradictory, unsupported and erroneous findings of the District Court and the ignoring of the all important statutes of the State of Oregon?

15. The opinion in this case is then wound up by the statement that:

> "* * * the ring embankment was built by contractors and the underpass was also built by con-

> tractors under the sole supervision, jurisdiction and control of the Oregon State Highway Commission, consequently, if Drainage District No. 2 had any claim for damages such claims should have been pressed against the contractors and the Oregon State Highway Commission."

The facts as disclosed by the "meticulous" pre-trial order are that the FPHA, a government agent, was given permission by the State Highway Commission to cut an underpass through private property over which it had no control, destroying the easement which District No. 2 had on Denver Avenue embankment and which was recognized by the Government in condemning the property upon which the ring dike was built subject to this easement. The same record shows that the underpass was constructed by FPHA and not by the State Highway Commission.

Thus it seems this Court approves the appellee's contention that the Highway Commission should be liable in this case because it constructed the underpass which was not the fact. The Highway Commission takes the position that it did not construct the underpass, it was a private way. It could not be done without the Highway Commission's consent. But under the statute it was up to the appellee to also procure the consent of the Court and District No. 2 and to substitute a ring dike with equal protection. These factual statements are true. A fine example of "passing the buck".

The Government had notice of the rights of District No. 2. The contract was in the deed to the county which had been duly recorded twice. The Government took

its land expressly subjected to this easement. Besides, the physical appearance could not help but put them on notice that this embankment was being used as a dike. (See Appendix A App. Br.).

THE PREDICAMENT OF THE APPELLANTS

Counsel for appellants wish to again express their confidence in the courts and the integrity of the judges and we still have full confidence that this Court will grant to the appellants a hearing upon the issues involved and will apply the facts as presented in the record to those issues. We feel that if that is done there can be no other finding than that the appellants were entitled to recover. But even if they are not entitled to recover, the 500 or so people involved will feel that at least the Court has considered their contentions and the issues involved and have recognized the true facts. Then they may be able to understand the decision.

However, their loss has been great. Their homes and property were destroyed. They had an all important specific contract for the protection of Denver Avenue embankment which has been emasculated and ignored by the Court. They have had faith in the Government's protection but this faith was destroyed when the Government refused and failed to recognize the duty imposed upon it by the all important statute to provide equal protection when the embankment was destroyed. Mortgage companies refuse to make loans in this area since 1948 for fear of floods and improvements for the most part are now more or less at a standstill. The fu-

ture for this district is bleak. A substitute dike for Denver Avenue embankment is both a physical and economical impossibility. There is no confidence in the Government being required to perform the duty imposed upon it by the Oregon statute. Their express contract to use Denver Avenue embankment has been emasculated and ignored. Would another contract suffer the same fate? This case would seem to be authority for the Highway Commission to grant a permit to similarly destroy the dike along the Columbia River over which the Highway Commission maintains a highway. It does seem to be authority for the proposition that anyone can destroy any of their dikes at any point and the duty to protect against it is transferred to and falls upon the district, not the wrongdoer.

The airport located in Multnomah District No. 1 to the east is currently contemplating the spending of several hundred thousand dollars for the construction of a cross dike for its protection which would answer the same purpose as Denver Avenue embankment afforded Peninsula District No. 2. If that is done will this case be authority for someone to destroy it with an underpass with immunity because he has no reason to anticipate the breaking of the outside dikes? And will the duty to protect against any such underpass fall upon the district and not the wrongdoer?

We have spoken of the agreement being emasculated. Perhaps we should elucidate.

The District Court in quoting the contract with the County substituted asterisks for the meat upon which

the appellants rely. By this interpretation the contract is left perfectly harmless and meaningless so far as the appellants' contentions and rights are concerned. Obviously the best contract ever written could be emasculated in the same manner and perhaps made to say exactly the opposite of what it is intended to say. We refer the Court to Item 8, page 73 to 76 of appellants' brief for a further discussion.

As a matter of fact the Plan of Reclamation for Peninsula District No. 2 was emasculated by the District Court in the same manner. By quoting sentences here and there taken from the entire instrument it is construed to mean just the opposite of what was intended and was clearly provided. We refer the Court to Item 1, pages 37 to 49 for a more complete discussion.

Then the District Court emasculated appellants' entire case by finding that the breaking of the Railway fill, two miles to the west, was the cause of the flooding of District No. 2 and eliminating all consideration of the facts set out in the pre-trial order and adopting factual findings completely contradictory thereto and not supported thereby.

The Honorable James Alger Fee wrote his second opinion in the Vanport cases, Clark v. U. S., 13 FRD 342 where the Court said:

> "When a plaintiff has by his counsel advised the Court and defendant of the theories upon which he relies and has given account of these, then the Court should not adopt some other theory of recovery, even if it should be believed that such a theory was more applicable. The other side has also a right to rely upon the theory stated by the

> counsel for the plaintiff, and it is entire (in)justice to require the defendant to accept some theory of law propounded by the Court for the first time in the opinion. Likewise, the defense in these cases very carefully sets up theories of defense. Here also the same considerations prevail. The defendant should be bound by such theories as well as the plaintiff, and the Court should not find some other ground on which to deflect the attack. If it should be believed either by the trial judge or the appellate judges that the theories are incorrect and do not fit the facts, then the case should be remanded for the purpose of drafting a new pre-trial order and these things should then be set forth. In this instance, it is believed that the pre-trial order covers very exactly both the theory of recovery and the theories of defense."

This opinion written by the Honorable Judge Fee we consider to be very well written, very educational and very instructive. We assume that it means what it seems to mean. That is, when the plaintiff sets forth his issues and theories of the case he is entitled to a hearing upon those issues and the Court should not adopt some other theory, either for the plaintiff or for the defendant. In the instant case the Court has adopted its theory entirely different from either the plaintiff's or defendant's and created a defense for the defendant that was never thought of by the defendant itself and which is not available to it. Certainly it is not taken from any of the pleadings, any of the contentions, or any of the evidence. If the Court can adopt some other theory of the case than is presented by the plaintiffs or defendants and can dismiss the case without trying out the issues presented, then these words, as it appears to us, become meaningless.

SUMMARY

Now summing up the issues in this case and the evidence, it becomes extremely simple. The Denver Avenue embankment was built over a strip of ground 317.6 feet in width. Eigthy feet, or approximately one-fourth of this belonged to the county and the balance of approximately three-fourths belonged to the landowners. The eighty feet was conveyed to the county for the consideration for their agreement to build this embankment. It is obvious from the instrument and from the circumstances that this embankment was to be built across swamp and overflowed land for a bridge approach and that the surrounding lands were to be reclaimed by dikes. It was considered between the parties, Peninsula Industrial Company and the County that this embankment would act for a dual purpose. It would provide a bridge approach for the all important interstate highway which would not be destroyed by the annual high water, and at the same time it would protect the land on either side from overflow from either direction. If the landowners could be encouraged to reclaim the land on either side this would lend further protection to the highway fill while the highway fill would be protection to the land on both sides. Therefore, this arrangement was one for mutual protection. The parties in this position drew an instrument, a deed, in which this contract between the two parties was very clearly and expertly set forth. This deed, including this agreement, is an extremely well-drawn document. There is no doubt that both parties expected the other to use

this embankment, the county for the purpose of maintaining a highway over the top, the landowners for the purpose of protecting their property from overflow, a situation that was for their mutual benefit. (Please see map, Appendix A App. Br.).

The title to the middle strip of eighty feet was taken over from the county by the Highway Commission but under no circumstances could it take over more than the county had which was merely a right to maintain the embankment and operate a roadway thereover, subject to the easement of the landowners to use the embankment for their own purposes, which very obviously was for no other reason than to protect their property from floods.

The Government condemned the property adjoining this embankment on the east in the area of the underpass, which was later built, subject to the easement of these landowners in District No. 2 to use this embankment for their protection.

The Government then, through FPHA, cut an underpass through this, having only the permission of the Highway Commission which owned only eighty feet of the 317.6 feet with an easement on the balance to maintain a highway over the top thereof and subject to the easement of the landowners in District No. 2 to use the embankment for their protection. The Highway Commission under these circumstances could have no rights whatsoever to cut such an underpass themselves or to permit it to be done.

The all important statute in the State of Oregon prohibits a landowner of a district over whose ground a dike runs from destroying the dike without permission of the Circuit Court and assuming the duty of substituting other protection of equal value to the satisfaction of the engineer for the district. This all important statute was entirely ignored by the District Court and entirely ignored by this Court. The duty imposed upon the Government to substitute equal protection under the express and clear terms of this statute was entirely ignored in both courts.

The ring dike, when it was built by the Government, was never intended for the purpose of living up to this duty. In fact, it is contended by the defense that no one was authorized to do anything for the protection of District No. 2. According to their contentions and the evidence, it was built for the protection of their own dollar investment in District No. 1 although the rights of District No. 1 and the rights of District No. 2 were identical and stemmed from the same identical instrument. This ring dike concededly was insufficient to give District No. 2 any protection because it had defects that were not apparent to the layman's eye and as a consequence residents of District No. 2 continued with the improving of their property, continued with the operation of their grade school behind this dike, continued to live in their homes undoubtedly depending upon the protection which they assumed was given by this ring dike. The ring dike was shown to be approximately the same size as outside dikes so that to the layman's eye

it afforded equal protection. It was a lure and a trap only for the residents of District No. 2.

These are the facts as set out by this "meticulous" pre-trial order. These are the facts upon which the entire issues and the right of the plaintiffs to recover depend. The case cannot properly be determined without the acknowledgment and the consideration of these issues and these facts, neither of which are disputable.

We realize this case has become quite complicated and confused. Counsel have undoubtedly failed in properly presenting it. However, we feel very strongly that regardless of our failure these appellants are entitled to a hearing on the issues attempted to be presented for them and on the true facts as set out in the pre-trial order. We respectfully urge the reconsideration of this case by the Court.

Respectfully submitted,

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